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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 In re] Case No. 01-55232-ASW
11 Larry C. Williams &]
12 Sharon E. Williams,] Chapter 7
13 Debtors.]
14

Larry C. Williams &]
15 Sharon E. Williams,] Adversary No. 02-5017
16 Plaintiffs,]
17 vs.]
18 Educational Credit Management]
19 Corporation,]
20 Defendant.]
21

22
23 MEMORANDUM DECISION
24 DETERMINING DEBTS TO BE DISCHARGEABLE
25

26 Before the Court is an amended complaint by Larry Williams
27 ("Husband") and Sharon Williams ("Wife"), who are the debtors in
28 this Chapter 7¹ case (collectively, "Debtors"). The complaint is

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¹ Unless otherwise noted, all statutory references are to
Title 11, United States Code ("Bankruptcy Code"), as applicable to
cases commenced on October 26, 2001.

1 against Educational Credit Management Corporation ("Creditor")² and
2 seeks a determination that debts owed to Creditor for student loans
3 taken by each of the Debtors are dischargeable in bankruptcy under
4 §523(a)(8), on the basis that payment of such debts would pose
5 undue hardship.

6 The Debtors are represented by Laurence J. McEvoy, Esq. of
7 Clayton & McEvoy, P.C. Creditor is represented by Miriam Hiser,
8 Esq. of the Law Offices of Miriam Hiser. The matter has been tried
9 and submitted for decision after post-trial briefing. This
10 Memorandum Decision constitutes the Court's findings of fact and
11 conclusions of law, pursuant to Rule 7052 of the Federal Rules of
12 Bankruptcy Procedure.

13
14 I.

15 FACTS

16 The Debtors filed a joint petition under Chapter 7 on October
17 26, 2001 and received a discharge of all dischargeable debts on
18 January 22, 2002.

19 Husband was born in 1949 and Wife was born in 1950; they have
20 been married since 1978. They are both licensed chiropractors and
21 operate their own practice in San Jose.

22 After high school, Husband entered the Marine Corps, where he
23 handled communications. He was discharged from the military in
24 1971 and worked at a variety of jobs while studying for an

25
26 ² The complaint originally included three more defendants:
27 Citibank (New York State), NA; USA Education, Inc.; and Student
28 Loan Marketing Association. It was amended April 22, 2002 to omit
those three defendants and add the United States Department of
Health and Human Services as a defendant; on June 28, 2002, the
amended complaint was dismissed as to that defendant by
stipulation.

1 electronics engineering degree at several junior colleges from 1972
2 through 1980. During that period, he was employed as an
3 electronics research and development engineering technician, a
4 personnel and placement counselor, and a sales representative. He
5 decided to change fields and enrolled at Palmer Chiropractic
6 College ("Palmer"), graduating in 1984. He then worked as an
7 examination doctor for a chiropractic practice until receiving his
8 license in 1985, when he joined the practice as an associate
9 chiropractor. He established his own practice in 1986 and has
10 operated it since that time, incorporating it in November 2000 on
11 the advice of his accountant.

12 Wife graduated from high school in 1969 and attended several
13 junior colleges until 1976. She transferred to Sacramento State
14 University in 1976, then to San Jose State University in 1978. In
15 1981, she enrolled at Palmer but was unable to complete the course
16 and stayed only one and a half semesters. In 1986, she graduated
17 from San Jose State University with a bachelor's degree in
18 psychology. She returned to Palmer in October 1986 and graduated
19 in 1989. She became licensed in 1991 and has practiced with
20 Husband since that time. Wife did secretarial and clerical work
21 for several employers from 1970 to 1987, and she also did office
22 work at Husband's practice without pay.

23 Husband testified that, while "generally I feel fairly
24 healthy", he does have "musculoskeletal problems, degenerative neck
25 problems, left shoulder dysfunctional problems, [and] lower back
26 problems". He said that these conditions cause some pain and
27 weakness, which require chiropractic and physical therapy treatment
28 "just about daily" -- medical treatment is available under his

1 health insurance plan but he has not sought it because he does not
2 believe that it "really [has] a whole lot to offer" for these
3 conditions at their current stages. Husband testified that these
4 ailments "occasionally" interfere with his ability to work,
5 sometimes for as much as "a few days", and up to a week on "a few
6 occasions over the years", but preventive measures and the
7 "conservative treatment" he receives do enable him to work
8 productively for eight hours a day "most of the time". Husband
9 stated that chiropractic work is "very prone" to cause "repetitive
10 trauma or stress type injuries", due to "a lot of bending, manual
11 work, leaning over quite a bit, [and] types of thrust involved",
12 such that there is a "high disability rate in the profession". He
13 said that "it seems to be rare" for chiropractors to practice
14 beyond the age of 60 due to the physical demands of the work, and
15 he knows of only one who is older than he is and still practicing.

16 Husband testified that Debtors' practice has the capacity of
17 seeing approximately 100 patients per week, but the patient load
18 dropped from that level during the "last year or so" to about 75
19 per week -- the week before trial, 92 patients were seen. He said
20 that the practice depends largely on referrals because that
21 generates the "best type of case and the most repeat business";
22 developing referrals requires providing a "very high level of
23 service" relative to the fee charged. The practice also performs
24 two annual promotions with mailings and certificates that offer a
25 "dramatically reduced entry cost", and maintains an advertisement
26 in the telephone directory. Husband testified that he does not
27 attempt to generate business by such means as appearing at
28 "storefronts" or sporting events to offer free "screenings", since

1 he is "absolutely terrible at actively promoting myself" and has
2 been unsuccessful as a salesman in the past because "it doesn't
3 work for me". Debtors did acquire the practice of a retiring
4 chiropractor in 2002, under an agreement whereby 50% of fees
5 received from that practice's patients were turned over to the
6 retired chiropractor for one year. Husband said that Debtors did
7 not expect to earn "a great deal of money" from those new patients,
8 but "we were trying to expand our referral base for the future",
9 and he estimated that "it might work out to be maybe about a 10%
10 increase over what we were doing before". Husband testified that,
11 when he began practicing, chiropractic practices typically could be
12 sold for a price equal to twice the annual gross receipts, but it
13 is now "very difficult" to sell one at all -- he said that he knew
14 of seven chiropractors who wanted to retire and tried for over a
15 year to sell practices that were fifteen to twenty-five years old,
16 but "finally just closed the doors and walked away". Husband
17 testified that Debtors' practice is located in an office building
18 in west San Jose, and requires equipment that must be replaced from
19 time to time. He said that a "primary concern" now is sixteen year
20 old x-ray equipment that will have to be replaced and could cost
21 "about \$30,000".

22 Husband testified that the business aspect of a chiropractic
23 practice has "changed a lot" since he graduated from Palmer, for
24 various reasons. One cause is a general trend toward "managed
25 care" insurance, under which "quite a restriction" was imposed on
26 coverage for chiropractic services -- Husband said that most plans
27 now do not cover such services at all, and the rest provide only
28 limited coverage. Another cause was "significant" reform of the

1 workers' compensation system in 1994. Husband testified that he
2 "was looking around" for ways to increase income and had just
3 become qualified as a medical evaluator to examine patients in
4 connection with disability claims and dispute resolution; but the
5 "big changes" permitted fewer patients to receive evaluations and
6 caused the "fee structure" to be "pretty much cut in half".
7 Husband also referred to what he described as a "potential
8 situation", in that physical therapists are now seeking the status
9 of "primary care providers" authorized to perform spinal
10 manipulations; if the State confers that status, "it will bring a
11 lot of competition into our niche in the market". Those specific
12 problems followed what Husband characterized as a general
13 "recession" and "economic downturn" commencing in 1990 and lasting
14 for two to three years. He said that he had "pretty much built my
15 practice" from people he knew at three or four large electronics
16 firms, and it "hit my practice particularly hard" when one of them
17 went out of business. Furthermore, Husband testified, "a general
18 down economy" in the past three years has now caused "a lot of
19 layoffs", resulting in loss of insurance benefits for those people.
20 In order to adjust to the reduced availability of insurance
21 coverage for chiropractic services, Husband said that Debtors'
22 practice has had to attract and maintain a larger share of
23 "personal paying patients" (i.e., those who do not rely upon
24 insurance coverage to pay the fees), which means that "you have to
25 keep the prices low". Husband testified that, when he began
26 practicing in 1984, the standard fee for a basic office visit was
27 \$39, whereas Debtors now charge "about \$40" (with a \$5 discount for
28 those who pay at the time of the service), "and that's pretty much

1 what the market will bear".

2 Husband estimated that Debtors' adjusted gross income for 2002
3 would be "around" \$101,000, although their tax returns had not yet
4 been prepared for that year. The parties stipulated that Debtors'
5 tax returns showed the following adjusted gross income for the
6 years 1997 through 2001:

7 1997: \$80,757

8 1998: \$92,567

9 1999: \$107,226

10 2000: \$111,876

11 2001: \$89,542

12 Husband testified that 1999 and 2000 were Debtors' "most lucrative
13 years" since they had become chiropractors, "boom years for
14 everyone, I think". He calculated Debtors' monthly earnings for
15 the period from 1997 to the date of trial in 2003 as follows:

16 1997: \$6,511 gross -- \$4,193 net

17 1998: \$7,565 gross -- \$3,726 net

18 1999: \$8,742 gross -- \$4,744 net

19 2000: \$9,171 gross -- \$5,739 net

20 2001: \$6,500 gross -- \$4,798 net

21 2002: \$6,500 gross -- \$4,771 net

22 2003: \$6,500 gross -- \$4,771 net

23 In addition to those earnings, Husband said that Debtors receive
24 monthly income from two assets inherited by Wife: approximately
25 \$140 from a mortgage that "will run about another ten years", and
26 approximately \$42 from gas well royalties that "should be ongoing".
27 Husband testified that Debtors' corporation paid \$17,000 in 2002 to
28 the retired chiropractor whose practice Debtors had acquired, and

1 that such payments would cease after May 2003. Debtors both
2 testified that they have worked only as chiropractors since
3 graduating from Palmer, have not looked for other employment, and
4 do not intend to do so. Wife testified that she was aware of no
5 other field in which she was qualified where she could earn more
6 than she does as a chiropractor. Although Wife has a bachelor's
7 degree in psychology, she said that she was never employed as a
8 psychologist and understood that such positions require at least a
9 master's degree, with some requiring a doctorate. Husband
10 testified that his highest average gross monthly income before
11 becoming a licensed chiropractor was \$2,500. Husband said that,
12 other than Wife's inherited mortgage and royalties, Debtors' only
13 investments are two additional inheritances of hers: 45 shares of
14 stock that were worth "\$2 and something per share last time I
15 checked"; and a fractional interest in a "small piece" of
16 unimproved rural land in Oklahoma, which had an assessed value of
17 \$50 approximately fifteen years ago. Husband stated that Debtors
18 have no assets of "significant value", no real property other than
19 the \$50 Oklahoma parcel, no savings or pension plan, and no
20 disability insurance.

21 Husband testified that Debtors' monthly expenses (exclusive of
22 student loan payments) total \$4,647.34, as follows:

23	Rent	\$2,050.00
24	Home maintenance and repair	\$ 23.43
25	Miscellaneous household	\$ 77.91
26	Groceries and sundries	\$ 822.00
27	Electricity and gas	\$ 167.00
28	Water	\$ 47.75

1	Telephone	\$ 22.77
2	Cable	\$ 44.25
3	Newspaper	\$ 16.42
4	Trash	\$ 16.40
5	Clothing	\$ 73.31
6	Medical	\$ 132.51
7	Dental	\$ 312.50
8	Auto operation and repair	\$ 251.87
9	Recreation and entertainment	\$ 24.66
10	Outside meals and takeout	\$ 35.85
11	Renters' insurance	\$ 31.67
12	Auto insurance	\$ 92.00
13	Bank fees	\$ 13.00
14	Son's health insurance and expense	\$ 106.58
15	Auto loan payment	\$ 246.31
16	Miscellaneous personal	\$ 36.15

17 With respect to the rent expense, Husband testified that Debtors
 18 have rented a three bedroom house near their practice for twenty-
 19 four years, under a "kind of gentleman's agreement lease". He said
 20 that Debtors "get along with the landlord pretty well" and "pretty
 21 much take care of" the house, doing "general maintenance" and
 22 projects that are not "major expenses", such as small plumbing
 23 jobs, lock repairs, etc. Husband testified that Debtors have not
 24 looked for less expensive housing and do not intend to do so,
 25 because he "would doubt very seriously" that they could find "a
 26 livable situation" in the San Jose area for less. He said that he
 27 deals with "an awful lot of people who talk to me all the time
 28 about the difficulty of finding affordable housing" with even

1 apartments costing \$1,800 to \$1,850 a month, so Debtors' rent
2 "seems the best I hear of anyone doing" and the expense of moving
3 would be "prohibitive at this time". As for the dental expense,
4 Husband testified that it is not being incurred now but Debtors'
5 dentist has told them that old fillings are "degenerating" and must
6 be covered by new crowns (four for Husband and six for Wife) at a
7 cost of \$750 apiece; Debtors have amortized that total over a two
8 year period. He said that Debtors have no dental insurance, though
9 their corporation does provide them with health insurance to cover
10 75% of office visit charges with a \$450 deductible for brand name
11 prescriptions (and a smaller deductible for other prescriptions).
12 With respect to the automobile expenses, Husband testified that
13 those do not reflect corporate reimbursement of 36.5¢ per mile for
14 business travel, which averaged approximately \$166 per month in
15 2002. He said that Debtors own two cars: a 1988 Buick Le Sabre
16 with 103,000 miles that "requires a lot of repair"; and a 1999
17 Toyota Camry purchased in February 2003, for which loan payments
18 will end in February 2008. Husband acknowledged that, since
19 Debtors work together, they could "sometimes" use a single car to
20 travel to and from work. Husband said that the expense for the son
21 included \$61.50 for health insurance premiums, with the balance
22 representing an average of what Debtors have spent in the past on
23 other costs such as emergency dental work; Debtors consider it more
24 economical to pay for the son's insurance than to cover his medical
25 bills. Husband stated that the son is twenty-seven years old and
26 in training as a personnel counselor with "not very much income",
27 but is not Debtors' "legal dependent". With respect to the expense
28 for groceries and sundries, Husband testified that it includes

1 items in addition to food, such as supplies for cleaning and
2 grooming.

3 In addition to the foregoing expenses, Debtors currently pay
4 \$400 per month for Wife's loan from the United States Department of
5 Health and Human Services ("HHS"), which is a "health education
6 assistance loan" ("HEAL Loan") made pursuant to 42 U.S.C. §292 et
7 seq. The parties stipulate that the Heal Loan bears interest at
8 the rate of 4.875%, and the balance of principal plus interest on
9 December 2, 2002 was \$95,315.28. The Heal Loan is not
10 dischargeable in this bankruptcy case pursuant to §292f(g)(1),
11 because it became due less than seven years prior to the petition
12 filing date.³ Husband testified that the current monthly payment
13 of \$400 was negotiated after Debtors filed bankruptcy, to last for
14 one year subject to review. He said "what they wanted to begin
15 with" was \$600 or \$700 per month and that is the amount that he
16 expects will be charged when HHS reviews the account.

17 The parties stipulate that the loans at issue in this Adversary
18 Proceeding are those created by consolidation of previous loans
19 into new loans ("New Loans"). In 1995, Husband consolidated loans
20 into a New Loan under a promissory note with interest at the rate
21 of 9% -- the parties stipulate that the balance of principal and
22 interest due on Husband's New Loan as of December 2, 2002 was
23 \$44,234.20. Husband testified that a total of \$52,332.17 in
24 payments was made on all of his student loans from July 21, 1982

25
26 ³ Three prerequisites to discharge are created by §292f(g),
27 and the first is that the debt first became due within seven years
28 before the bankruptcy case was filed (exclusive of any
forbearances). The Heal Loan was made in May 1995 and the seven
year period was extended two years, five months, and twenty-eight
days by a total of five forbearance agreements. This bankruptcy
case was filed in October 2001, which was less than seven years
after the extended repayment date.

1 through September 28, 2001, of which \$23,346.75 was paid on the New
2 Loan from January 11, 1996 through September 28, 2001. In 1993,
3 Wife consolidated loans into a New Loan under a promissory note
4 with interest at the rate of 9% -- the parties stipulate that the
5 balance of principal and interest due on Wife's New Loan as of
6 December 2, 2002 was \$123,210.79. At trial, Creditor's counsel
7 contended that the stipulated total did not include statutory
8 collection costs provided for by the note, and that the total with
9 such collection costs was \$154,013.49 as of March 27, 2003; Debtors
10 presented no evidence of a different total.⁴ Husband testified
11 that a total of \$13,306,27 in payments was made on all of Wife's
12 student loans (other than the HEAL Loan) from December 29, 1986
13 through February 14, 2001, of which \$11,243.44 was paid on the New
14 Loan from May 18, 2000 through February 14, 2001; an additional
15 \$29,588.14 was paid on the HEAL Loan from September 17, 1986
16 through February 3, 2003.

17 Wife testified as follows about her efforts to make payments on
18 her New Loan. She consolidated previous loans into the New Loan
19 because she could not afford to make payments when the previous
20 loans came due, and she understood that consolidation would give
21 her additional time before commencing repayment. At time of trial,
22 she was "not sure" that she had understood when consolidating that
23 a new repayment period of from twenty-three to twenty-five years
24 would be created, and "hindsight tells me I did not understand".

25
26 ⁴ However, Debtors' counsel stated at trial that he was not
27 willing to stipulate to Creditor's total because Debtors did not
28 want to be bound by that figure if the debt were determined to be
non-dischargeable. Creditor's counsel replied that the purpose of
this Adversary Proceeding initiated by Debtors was only to
determine dischargeability and Creditor is not seeking a money
judgment, so that Debtors would remain free to challenge the amount
of the debt even if it were found to be non-dischargeable.

1 Her last forbearance under the New Loan was granted orally in June
2 1998, to extend through March 1999; when that expired, she received
3 a notice that monthly payments of \$845 would be required. Wife
4 could not afford that amount and asked what other options were
5 available -- she was told that no further forbearances were
6 available and she could only "refinance" through the William D.
7 Ford Program ("Ford Program") or seek a hardship deferment. Wife
8 investigated the Ford Program but "understood" that it required a
9 "loan fee" of 18% and carried a 14% interest rate, so she
10 considered the hardship deferment the option that was applicable to
11 her circumstances.⁵ Wife applied for the hardship deferment by
12 submitting "extensive" documents -- she received a telephone call
13 in December 1999, telling her that the deferment would end on March
14 28, 2000 and payments would have to begin at that time; but she was
15 never explicitly told (orally or in writing) that the deferment had
16 been granted. In the first week of April 2000, she received a form
17 letter that the loan had "been defaulted for non-payment and she
18 had not "been in touch with them". Wife "panicked" because she had
19 believed that she had been granted a hardship deferment -- she made
20 "several" telephone calls daily (perhaps as many as thirty calls
21 that month), wrote letters asking about the status and seeking
22 administrative review, "begged for information about what
23 happened", and "just knew there had to be a mistake". Despite Wife
24 "contacting them regularly extensively in writing", she received "a
25 lot" of calls and form letters saying that she had not tried to
26 "contact them" or made efforts to repay, and that the loan would

27
28 ⁵ Creditor did not offer evidence on this point, but Creditor's attorney stated in argument that the Ford Program charges no "fee" to join, and Wife's collection costs would be reduced from a current 25% to 18.5% under the Ford Program.

1 remain in default until she "contacted them". In May 2000, Wife
2 "took it on myself to start making payments" because she "just felt
3 it was so important to show good intentions", and sent a check for
4 \$1,000. In July 2000, she received a form letter stating that the
5 account had been assigned to a collection agency and "he could send
6 people to my home to check my records and seize property" if she
7 did not immediately send a payment of \$1,640, which she did. The
8 collection agency also told her that she must pay \$1,640 per month
9 for six months in order to preserve her option to apply to the Ford
10 Program. Wife did not understand or agree with the collection
11 agency's quoted balance of \$62,000, but sent payments of \$1,640
12 from August through December 2000, while continuing to ask for
13 information and explanations. In January 2001, Wife received a
14 letter saying that her requested administrative review had been
15 completed, no error was found, and the loan remained in default due
16 to lack of payments for 180 days; there was no mention of a
17 hardship deferment or the several recent payments of \$1,640, and
18 Wife's "multiple, multiple phone calls" were not acknowledged. At
19 that time, Wife had received no verification from the collection
20 agency that her payments had been received or applied, and "decided
21 to pretty much give up". She made two more payments of \$200 each
22 and "felt I had exhausted my finances". In April 2001, Wife
23 received a letter stating that she had three options: consolidate
24 through the Ford Program; or submit at least three "qualifying
25 payments" that would permit consolidation through a different
26 lender; or submit at least twelve "qualifying payments" that would
27 permit her to participate in a "loan rehab program" -- the letter
28 did not refer to the payments made from May 2000 through February

1 2001, and Wife was "extremely frustrated", "had no more money to
2 send to them", did not know what was happening to the payments that
3 had been sent, and "felt defeated". Telephone calls from the
4 collection agency eventually ceased, only to commence from "Ed
5 Fund" (the servicing agent for the New Loan), the calling was "much
6 worse, daily, multiple, including to my office" -- Wife attempted
7 to explain the problems to Ed Fund and furnished all requested
8 financial information, but reached no solution. Commencing in
9 1999, Wife asked for accountings of her New Loan balance but never
10 received a "meaningful response". When she was told that the loan
11 was in default, she "couldn't accept" the reported balance of
12 "somewhere around \$107,000", then received another notice within a
13 few weeks stating that the balance was "around \$113,000" -- charges
14 were made for such items as "miscellaneous fees" of \$7,000 and
15 \$10,000 -- "I asked where all these numbers came from, what's being
16 added on". Wife's accountant told her that she needed a
17 "statement" and she made a written request for one, but "was told
18 they're not a bank and don't have to provide a statement", unlike
19 "other financial institutions" with which she had dealt.

20 The parties agree that the Ford Program offers an "Income
21 Contingent Repayment Plan", under which payments based on income
22 would be made for a maximum of twenty-five years, with any unpaid
23 balance forgiven at the end of that time. The parties also agree
24 that debt forgiveness constitutes taxable income pursuant to 26
25 U.S.C. §61(a)(12), unless the taxpayer is insolvent pursuant to 28
26 U.S.C. §108(a)(1)(B).

1 II.

2 APPLICABLE LAW

3 Bankruptcy Code §523(a)(8) provides that student loans such as
4 the New Loans at issue here are excepted from a Chapter 7
5 bankruptcy discharge unless the debtor shows that "excepting such
6 debt from discharge under this paragraph will impose an undue
7 hardship on the debtor and the debtor's dependents". The Debtors
8 claim that they would suffer undue hardship if the debt to Creditor
9 had to be repaid.

10 The Code does not define "undue hardship", but the Ninth
11 Circuit has adopted the three-part test of In re Brunner, 46 B.R.
12 752 (S.D.N.Y. 1985), aff'd, 831 F.2d 395 (2nd Cir. 1987)
13 ("Brunner") to determine whether "undue hardship" exists, see In re
14 Pena, 155 F.3d 1108 (9th Cir. 1998) ("Pena"). That test requires a
15 debtor to prove each of the following:

16 First, the debtor must establish "that she cannot
17 maintain, based on current income and expenses, a
18 'minimal' standard of living for herself and her
dependents if forced to repay the loans."
[Citation omitted]

19 Second, the debtor must show "that additional
20 circumstances exist indicating that this state of
21 affairs is likely to persist for a significant
portion of the repayment period of the student
loans." [Citation omitted]

22 The third prong requires "that the debtor has
23 made good faith efforts to repay the loans...."
[Citation omitted]

24 Pena, at 1112.

25 When a debtor proves all three parts of the test and thus shows
26 that undue hardship would result from having to pay the entire
27 loan, it may nevertheless be the case that paying only part of the
28 loan would not impose undue hardship. In that event, the loan can

1 be partially discharged, see In re Saxman, 325 F.3d 1168, 1173-1174
2 (9th Cir. 2003):

3 ... once the debtor has satisfied the Brunner
4 factors and the court has concluded that the debt
5 is too great for the debtor to shoulder,
6 §523(a)(8) is silent with respect to whether the
7 bankruptcy court may partially discharge the
8 loan. Although §523(a)(8) is the sole mechanism
9 by which debtors may seek discharge of student
10 debt, it is not the only provision bearing on the
11 dischargeability of student loans. [¶]
12 Following [In re Myrvang, 232 F.3d 1116 (9th Cir.
13 2000)], it is now generally recognized that an
14 all-or-nothing approach to the dischargeability
of student debt contravenes Congress' intent in
granting bankruptcy courts equitable authority to
enforce the provisions of the Bankruptcy Code.
[footnote omitted] Under 11 U.S.C. §105(a),
bankruptcy courts may "issue any order, process
or judgment that is necessary or appropriate to
carry out the provisions" of the Bankruptcy Code.
In [In re Hornsby, 144 F.3d 433 (6th Cir. 1998)
("Hornsby")], the Sixth Circuit held that §105(a)
authorizes bankruptcy courts to enter partial
discharges in student loan cases.

15 The Ninth Circuit endorsed Hornsby's application of §105(a) to
16 permit partial discharge, but disagreed with that case's failure to
17 require a finding of undue hardship with respect to the discharged
18 portion of a loan.

19 We therefore conclude that before the bankruptcy
20 court can partially discharge student debt
21 pursuant to §105(a), it must first find that the
portion being discharged satisfies the
requirements under §523(a)(8).

22 Saxman, at 1175.

24 III.

25 ANALYSIS

26 A. Minimal Standard of Living

27 The first prong of the Brunner test requires the Debtors to
28

1 show that, based on current income and expenses, they cannot
2 maintain a minimal standard of living if the debt to Creditor had
3 to be repaid.

4 To meet this requirement, the debtor
5 must demonstrate more than simply tight
6 finances. In defining undue hardship,
7 courts require more than temporary
8 financial adversity, but typically stop
9 short of utter hopelessness. The proper
inquiry is whether it would be "unconscionable"
to require the debtor to take steps to earn
more income or reduce her expenses. In re
Nascimento, 241 B.R. 440, 445 (9th Cir. BAP
1999) (citations omitted).

10 In re Birrane, 287 B.R. 490, 495 (9th Cir. BAP 2002) ("Birrane").

11 Debtors' net monthly earnings at time of trial were \$4,771,
12 which is consistent with their average net monthly earnings of
13 \$4,534 since 1997. They also received \$182 per month from Wife's
14 inherited mortgage and royalties -- the parties agree that, after
15 taxes, the additional net monthly income from those sources is
16 \$112, for a total net monthly income of \$4,883.

17 Debtors' monthly expenses at time of trial totalled \$5,047.34,
18 of which \$400 represents the amount currently being paid on Wife's
19 HEAL Loan under a temporary one-year arrangement with HHS.
20 Debtors' current expenses therefore exceed their current income by
21 \$164.34,⁶ without any payments being made on the New Loans.

22 Creditor argues that the following items are not properly
23 included among Debtors' current expenses:

24 First, Creditor notes that the dental expense of \$312.50
25 is not actually being paid now and is merely a projected future
26

27 ⁶ Creditor argues that Debtors have a legal duty to
28 "maximize" income and "minimize" expenses, but have not done
either. Pursuant to Birrane, that issue will be directly addressed
under the third prong of the Brunner test.

1 expense, because it represents the monthly amount that would be
2 required to pay \$7,500 in charges that Debtors expect to incur over
3 the next two years. However, Husband's unchallenged testimony was
4 that Debtors suffer now from ten degenerating fillings that must be
5 repaired at a cost of \$750 each, so including this amount as a
6 current expense reflects monthly savings to pay the cost of
7 anticipated treatment for a current condition.

8 Second, Creditor notes that Debtors are not legally
9 required to pay for the adult son's health care and argues that
10 the \$106.58 allocated to that purpose therefore should not be
11 treated as one of Debtors' expenses. Creditor cites caselaw from
12 other jurisdictions holding that a debtor's legally unnecessary
13 payment of expenses for family members constitutes self-imposed
14 hardship,⁷ and Debtors do not argue otherwise, either factually or
15 legally. This Court has found no support for the notion that a
16 minimal standard of living under the first prong of the Brunner
17 test should include voluntary assumption of non-dependent family
18 members' expenses without a legal obligation to do so. Deducting
19 the \$106.58 expense for the son reduces total monthly expenses to
20 \$4,940.76.⁸

21 Creditor argues that certain expenses are unnecessary to a
22 minimal standard of living. That term has not been defined by the
23

24
25 ⁷ In re Stebbins-Hopf, 176 B.R. 784 (Bankr.W.D.Tex. 1994);
26 In re Coveney, 192 B.R. 140 (Bankr.W.D.Tex. 1996); In re Archibald,
27 280 B.R. 222 (Bankr.S.D.Ind. 2002); In re Conner, 89 B.R. 744
28 (Bankr.N.D.Ill. 1988).

29 ⁸ Even as so reduced, expenses still exceed monthly income
30 by \$57.76. As discussed below, the Court considers that Debtors'
31 budget as adjusted to delete this expense reflects a minimal
32 standard of living for them. Since expenses exceed income, it
33 follows that no part of the New Loans can be paid.

1 Code or caselaw, there was no evidence at trial concerning local
2 norms (whether minimal or otherwise), and the only evidence
3 regarding the cost of living was Husband's testimony about rent.
4 Creditor takes issue with the following expenses:

5 First, Creditor urges that Debtors do not require a three
6 bedroom house for \$2,050 and should move to something less
7 expensive. However, Husband testified that he had heard that even
8 apartments cost \$1,800 to \$1,850 and Debtors' rent "seems the best
9 I hear of anyone doing", the cost of moving would be "prohibitive",
10 Debtors have a twenty-four year good relationship with their
11 landlord, and they handle routine maintenance for the property. It
12 may well be that Debtors are paying reduced rent in exchange for
13 providing the landlord with stability and services, which probably
14 would not be the case if they were to move. Moreover, there was no
15 evidence that alternative housing was available at all, much less
16 near Debtors' office (as their current home is) so as to avoid the
17 expense of commuting longer distances. Assuming that Debtors were
18 able to find other suitable housing, they would have to pay the
19 cost of moving and that would presumably include a security deposit
20 and some prepaid rent -- Husband characterized that expense as
21 "prohibitive"⁹ and Debtors have no savings or other cash reserves
22 with which to meet it.

23 Second, Creditor contends that Debtors do not require two
24 automobiles because they work together, so the older car (which
25 Husband testified needs "a lot of repair") should be sold to
26

27 ⁹ If the rent for an apartment were \$1,800 as Husband
28 testified he had heard, it would cost \$5,400 to pay a typical
security deposit equal to one month's rent plus prepaid rent for
the first and last months' tenancy. The cost of moving Debtors'
furniture and other belongings would be an additional expense.

1 eliminate much of the \$251.87 in auto operation and repair expense;
2 and any remaining expense should be largely offset by the 36.5¢ per
3 mile reimbursement that Debtors receive from their corporation.
4 However, Husband testified that Debtors could travel to work
5 together "sometimes", which implies that the second car is needed
6 for that purpose the rest of the time.

7 Third, Creditor considers \$822 for food to be excessive,
8 especially when coupled with \$77.91 for miscellaneous household
9 expenses and \$36.15 for miscellaneous personal expenses. However,
10 Creditor's opinion is not supported by evidence that these amounts
11 exceed some lower norm or represent purchase of luxuries rather
12 than necessities.

13 Fourth, Creditor asserts that a minimal standard of living
14 does not include cable television (\$44.25), outside meals and
15 takeout (\$35.85), and newspaper (\$16.42), so that each of those
16 expenses should be eliminated.¹⁰ Again, there is no evidence of a
17 norm that excludes such items, although it is arguable that they
18 may be optional and therefore unnecessary for a minimal standard of
19 living. However, some of these expenses are similar to (and most
20 are significantly less extreme than) the kind of expenses that were
21 accepted by the Ninth Circuit in In re Rifino, 245 F.3d 1083 (9th
22 Cir. 2001) ("Rifino"):. tanning salon visits; cable television;
23 new car payment; son's enrollment in private elementary school;
24 son's Aikido, swimming, and skating lessons; and son's
25 participation in Little League and cross country-CYO. The trial

26
27 ¹⁰ The \$35.85 monthly expense for outside meals and takeout
28 amounts to about \$1.20 per day for the couple, or 60¢ apiece per
day for two busy professionals who are working away from home. As
for newspapers, this Court is not prepared to find that they are a
luxury or an expense that is not included in a minimal standard of
living.

1 court held that the debtor met the minimal standard of living test
2 despite the inclusion of these expenses, noting that while "[i]t is
3 conceivable that [the debtor] could reduce some of the items in her
4 budget, ... such reductions would be minimal and inconsequential",
5 which result was upheld on appeal, Rifino at 1088. The three
6 expenses in this case total only \$96.52, which is likewise minimal
7 and inconsequential in the context of Debtors' total expenses
8 exceeding \$5,000.

9 Even assuming for the sake of argument that all of Creditor's
10 suggested reductions should be made (and the Court does not find
11 that they should), the result under the first prong of the Brunner
12 test would not change. To wit: reduce rent by \$200 based on
13 Husband's testimony about apartment rents; substantially reduce
14 automobile operation and repair expense of \$251.87 through sale and
15 offsets by, say, \$200; reduce the approximately \$936 expense for
16 food and miscellaneous supplies by some arbitrary percentage, say
17 roughly one-third, or \$300; and eliminate the approximately \$100
18 total for the three allegedly unnecessary expenses. Those total
19 reductions of \$800 would decrease the current expenses from
20 \$4,940.76 (as adjusted to delete payment of the son's expense) to
21 \$4,140.76 -- Debtors' net income is \$4,883, which would leave a
22 surplus of \$742.24.¹¹ However, that is far less than would be
23 needed to pay the New Loans. Debtors' post-trial brief includes
24 calculations amortizing the New Loans over a "work life" of six to
25
26
27

28 ¹¹ If the HEAL Loan payment rises by some \$200 to \$250 per
month (as Husband testified it was expected to do), that increase
would absorb approximately one-third of such a surplus.

1 ten years,¹² which show that monthly payments would be from \$753 to
2 \$529 on Husband's New Loan, and from \$2,776 to \$1,950 on Wife's New
3 Loan . Accordingly, if Debtors were to retire ten years after
4 trial in 2003 (at Husband's age 64 and Wife's age 63, in 2013),
5 monthly payments of \$2,479 (\$529 plus \$1,950) would be required to
6 pay the New Loans in full by that time. The original term of
7 Husband's New Loan was twenty-five years from January 12, 1996
8 (January 12, 2021, eighteen years from trial in 2003) and the
9 original term of Wife's New Loan was twenty-three years and three
10 months from January 9, 1994 (April 9, 2017, fourteen years from
11 trial in 2003) -- it is unclear what the balances of the terms are
12 after forbearances and defaults, but the Court has calculated
13 amortizations over a twenty year period (to Husband's age 74 and
14 Wife's age 73, in 2023) and a fifteen year period (to Husband's age
15 69 and Wife's age 68, in 2018). The monthly payments required to
16 pay the New Loans off in twenty years would be \$376.29 for Husband
17 and \$1,385.69 for Wife, a total of \$1,761.98 -- the monthly
18 payments required to pay the New Loans off in fifteen years would
19 be \$424.20 for Husband and \$1,562.10 for Wife, a total of
20 \$1,986.30. As set forth above, even when Debtors' budget is
21 adjusted to reflect what Creditor considers to be a minimal
22 standard of living, the monthly surplus is only \$742.24 -- that is

24 ¹² Creditor does not contradict the calculations, but does
25 dispute the assumption that Debtors' remaining work life will be
26 only six to ten years. However, Creditor provided no evidence of
27 how long chiropractors generally work, whereas Husband testified
28 without contradiction that he is aware of only one chiropractor
older than he who continues to practice, and "it seems to be rare"
for them to practice beyond the age of 60 due to the work's
physical demands. Husband also testified that he suffers some pain
and weakness that is exacerbated by his work, which requires
treatment "just about daily" and "occasionally" interferes with his
ability to practice.

1 \$1,019.68 less than the monthly payment needed to retire the New
2 Loans in twenty years when Debtors are over 70, and from \$1,736.76
3 to \$1,244.06 less than the amounts required to pay them off by the
4 time Debtors reach more typical retirement ages (at least for other
5 professions) in their sixties within ten to fifteen years.

6 As discussed below, Creditor calculates that Debtors could
7 consolidate the New Loans and Wife's HEAL Loan under the Ford
8 Program and pay \$1,496.95 per month based on current annual income
9 of approximately \$101,000 (with the payment changing if income were
10 to change). But Debtors' budget cannot support that amount either,
11 even when expenses are reduced as Creditor urges they should be.
12 Debtors' current monthly expenses without the \$400 HEAL Loan
13 payment total \$4,647 -- after deleting \$106.58 for the son's
14 expense, the total is \$4,540.42 -- after deducting \$800 for what
15 Creditor considers to be unnecessary expenses, the total is
16 \$3,740.42. Debtors' net monthly income is \$4,883, which is a
17 surplus of \$1,142.58. That surplus is \$354.37 less than the
18 monthly payment that Creditor calculates would be required to pay
19 all three loans under the Ford Program.

20 Finally, the Court notes that Debtors' current expenses include
21 no contributions to a retirement account or pension plan. That
22 should be reflected in even a minimal standard of living for a
23 middle-aged couple who lack savings.

24 Debtors' current income and expenses would not permit them to
25 maintain a minimal standard of living if the New Loans, or any part
26 of them, were repaid.

1 B. Additional Circumstances

2 The second prong of the Brunner test requires the Debtors to
3 show that additional circumstances exist such that the current
4 state of affairs will persist over the life of the loan repayment
5 period.

6 The "additional circumstances" prong of
7 the Brunner test "is intended to effect
8 'the clear congressional intent exhibited
9 in §523(a)(8) to make the discharge of student
10 loans more difficult than that of other non-
11 excepted debt.' " Rifino, 245 F.3d at 1088-89
12 (citations omitted). There must be evidence
13 that the debtor's "road to recovery is ob-
14 structed by the type of barrier that would
15 lead [the court] to believe he will lack the
16 ability to repay for several years." [cita-
17 tion omitted]. Examples of such barriers may
18 include psychiatric problems, lack of usable
19 job skills and severely limited education.
20 [citation omitted].

21 Birrane, at 497.

22 In this case, Debtors are not unskilled or uneducated, but the
23 skills and education that they have do not equip them to enter
24 different fields that are more lucrative, and their ages do not
25 give them enough time to undertake any extensive retraining (nor
26 would they be able to pay for it). Husband has done no other kind
27 of work since 1986 and Wife has not since 1991; neither of them had
28 an established career in any particular field prior to becoming
chiropractors. Husband had three different occupations over a nine
year period and never earned more than \$2,500 gross per month --
Wife had several secretarial and clerical jobs for seventeen years,
and testified that she knew of no field for which she is qualified
that would pay her more than she earns now; although she has an
undergraduate degree in psychology, she has never worked as a
psychologist and she testified without contradiction that more

1 advanced degrees are required for employment in that field.

2 Not only do Debtors lack realistic prospects of better
3 employment, but their income as chiropractors is unlikely to
4 increase and will end whenever they retire.¹³ Husband testified
5 without contradiction that the practice now charges "pretty much
6 what the market will bear", and Debtors increased the patient load
7 to its current levels by such means as acquiring the practice of a
8 retiring chiropractor and periodically offering coupons for reduced
9 prices to attract new patients. Creditor argues that Debtors
10 should promote the practice through public appearances, but Husband
11 testified that he was an unsuccessful salesman in the past and "it
12 doesn't work for me" because he is "absolutely terrible at actively
13 promoting myself", so it appears that any such efforts would be
14 futile. Husband testified plausibly that business conditions for
15 chiropractic practices have declined due to restrictions imposed by
16 the insurance and workers' compensation industries, and to a
17 depressed local economy -- he anticipates additional problems in
18 future if licensing requirements are changed to permit increased
19 competition. Debtors' income will drop slightly when Wife's
20 inherited mortgage is paid off in approximately ten years and no
21 longer generates \$140 per month. It is possible that Debtors could
22 receive some additional compensation when their corporation no
23 longer has to pay for the practice that was purchased from the
24 retired chiropractor; those payments were to be made for a one year
25 period ending in May 2003 and totalled \$17,000 in 2002. However,
26 there was no evidence about what the corporation will save monthly
27 by not making those payments, nor about what (if any) part of such

28 ¹³ And, as discussed above, at page 24, the couple has no savings and no retirement plan whatsoever.

1 savings Debtors might receive as additional income, and that
2 information cannot be extracted from the evidence in the record.
3 Since the one year payment period ends in the fifth month of 2003,
4 the \$17,000 paid in 2002 must have covered seven months of the
5 total period, which is an average monthly payment of approximately
6 \$2,428 -- but the payments are based on a percentage of monthly
7 revenues generated by the acquired patients during one year, and
8 the record does not provide those figures for any part of the
9 payment period.¹⁴ In any event, Debtors' compensation from their
10 corporation might be reduced in future when the sixteen year old
11 x-ray equipment has to be replaced at a possible cost of \$30,000
12 (although there is no evidence about how that corporate expense
13 might affect Debtors' compensation). As noted above, Husband
14 testified that chiropractors typically retire by age 60 due to the
15 work's physical demands, and he already suffers some pain and
16 weakness that occasionally interfere with his ability to treat
17 patients. When Debtors do retire from their practice, their income
18 is likely to decrease, since they are not qualified to earn as much
19 as they do now even if they were to undertake some other
20 employment.

21 Debtors' expenses are certain to increase at least somewhat,
22 and possibly quite a bit. At time of trial, the non-dischargeable
23 HEAL Loan was being paid at a temporarily reduced rate of \$400 per
24 month subject to review in one year, and Husband testified that the
25

26 ¹⁴ The only evidence on that subject was Husband's testimony
27 that Debtors hoped the acquired patients would "expand our referral
28 base for the future" and "it might work out to be maybe about a 10%
increase over what we were doing before". That does not show how
much money the corporation will save by ceasing payments for the
acquired patients, nor does it show whether or how any such savings
would affect Debtors' monthly compensation from the corporation.

1 monthly payment would probably be raised to \$600 or \$700 because
2 that is "what they wanted to begin with". Debtors' post-trial
3 brief includes calculations amortizing the HEAL Loan over a work
4 life of six to ten years, which show that monthly payments would be
5 from \$1,522 to \$1,000. The maximum term of the HEAL loan (as
6 extended by forbearances) is twenty-five years from 1998, i.e.,
7 2023 when Husband will be 74 and Wife will be 73 -- the Court has
8 calculated amortization over the twenty year period between that
9 date and trial in 2003, which shows that a monthly payment of
10 \$619.47 would be needed to pay the HEAL Loan in full by the end of
11 its maximum term (assuming the current 4.25% rate of interest; the
12 interest rate is variable). Debtors' expenses will be reduced by
13 \$246.31 per month when the automobile loan payment ceases in
14 February 2008; but, assuming that the automobile continues to
15 function well in five years, that reduction is almost fully offset
16 by the minimum increase in the HEAL Loan payment (from \$400 to at
17 least \$619.47) -- and the reduction will not occur until February
18 2008, whereas the HEAL Loan increase is scheduled to occur during
19 2003. Moreover, if Debtors attempt to pay the HEAL Loan off by a
20 typical retirement date within six to ten years, that monthly
21 payment will increase from \$400 to \$1,522 or \$1,000 and fully
22 absorb all savings represented by cessation of the automobile loan
23 payments. Further, Debtors have no dental insurance and their
24 medical insurance requires them to cover co-payments and
25 deductibles -- if their health declines as they age, as the health
26 of most people does, those expenses will necessarily rise.
27 Finally, since Debtors have no savings or pension plan and are now
28 in their mid-fifties, it would be prudent for them to increase

1 expenses by adding some provision for retirement.

2 Whether the repayment periods for the New Loans is six to ten
3 years or fifteen to twenty years, additional circumstances exist
4 that cause the current state of affairs to persist throughout those
5 repayment periods.

6
7 C. Good Faith

8 The third prong of the Brunner test requires the Debtors to
9 show that good faith efforts were made to repay the loan.

10 Courts have measured good faith by examining
11 various factors; the fact debtor has made no
12 payments or has made some payments on the loan
13 is not in and of itself dispositive. [citation
14 omitted] (court may evaluate the debtor's conduct
15 in the broader context of his total financial
16 picture). "Good faith is measured by the debtor's
17 'efforts to obtain employment, maximize income,
18 and minimize expenses.' " [citations omitted];
19 see also Pena, 155 F.3d at 1114 (holding that
20 bankruptcy court did not clearly err in finding
21 that debtor had exhibited good faith in paying
22 back student loans where, inter alia, debtor used
23 large sum disability benefits distribution to pay
24 down portions of other debts that were approximately
25 four times amount of student loans). "A debtor's
26 effort -- or lack thereof -- to negotiate a re-
27 payment plan is an important indicator of good
28 faith." [citation omitted].

Birrane, at 499.

21 It is undisputed that Debtors have made very significant
22 payments on all of their several student loan obligations,
23 including the New Loans -- Husband paid a total of \$52,332.17 over
24 a nineteen year period, of which \$23,346.75 was paid on his 1995
25 New Loan in five and a half years -- Wife paid a total of
26 \$42,894.41 over a seventeen and a half year period, of which
27 \$11,243.44 was paid on her 1993 New Loan in approximately one year.
28 Wife testified credibly and without contradiction about her belief

1 that she had received a hardship deferment, her extensive efforts
2 to learn the status of her New Loan and obtain an accounting to
3 explain the increasing balance and addition of unidentified
4 charges, and her tendering of large payments for several months
5 despite a lack of information in response to her constant requests.
6 There is no question that Debtors made serious attempts to pay the
7 New Loans over long periods of time.

8 As discussed above, Creditor argues that Debtors should have
9 done more to increase income and decrease expenses. However, for
10 the reasons set forth above, the Court does not consider that
11 Debtors could or should have done more than they did. For example,
12 Creditor argues that Debtors should have sought less expensive
13 housing -- but Husband testified that he deals with "an awful lot
14 of people who talk to me all the time about the difficulty of
15 finding affordable housing", Debtors' rent "seems the best I hear
16 of anyone doing", and the cost of moving would be "prohibitive" --
17 under those circumstances, it was not bad faith for Debtors to
18 refrain from the apparently futile exercise of searching for a new
19 home. Creditor also argues that Wife should have applied for
20 secretarial jobs -- but Wife has not done such work for over ten
21 years and testified that she did not believe she was qualified for
22 any field that would pay more than she was earning -- it was not
23 bad faith for Wife to refrain from seeking a job for which she
24 considered herself unqualified.

25 Creditor also argues that it is bad faith for Debtors not to
26 have made use of the Ford Program. Creditor calculates that
27 Debtors could consolidate the New Loans and the HEAL Loan under the
28 Ford Program and qualify for monthly payments of \$1,496.95 based on

1 their estimated 2003 adjusted gross income of approximately
2 \$101,000. Creditor notes that the payment amount would be based on
3 income, so it would be reduced should income fall (such as upon
4 retirement) -- payments would be required for twenty-five years,
5 but any balances that remained outstanding at that point would be
6 forgiven. However, as set forth above, Debtors' budget would not
7 support such a payment. Moreover, the current state of the law is
8 that debt forgiveness is treated as taxable income unless a
9 taxpayer is insolvent. Debtors' post-trial brief includes
10 calculations showing that the unpaid balances at the end of twenty-
11 five years would be between \$300,000 and \$400,000 -- Creditor
12 objects that those calculations are based on various assumptions
13 about evidence that was not presented at trial (e.g., Social
14 Security benefit rates and amounts). The Court's calculations
15 (based only on the undisputed balances of the three loans, the
16 7.549% interest rate under the Ford Program, and a twenty-five year
17 term) show that a monthly payment of \$2,182.01 would be required to
18 pay the three loans in full within the term of the Ford Program.
19 That amount is \$685.06 more than the \$1,496.95 monthly payment
20 based on current annual income of \$101,000, so it is obvious that
21 some significant part of the balances would remain unpaid at the
22 end of twenty-five years even if Debtors' income were always as
23 high as \$101,000 (which is unlikely) so as to keep the payments up
24 to \$1,496.95.¹⁵ Twenty-five years from now, Husband will be 79
25 years old and Wife will be 78 years old -- unless they are
26
27

28 ¹⁵ In any event, the issue in the good faith analysis is not
what the unpaid balances would actually be, it is what the Debtors
reasonably believed they would be.

1 insolvent at that point,¹⁶ forgiveness of any balances that were not
2 paid under the Ford Program would constitute taxable income, at a
3 time when Debtors are likely to be earning nothing and depending
4 upon Social Security benefits. Creditor notes that the law may
5 well change in the next twenty-five years, so that the Ford Program
6 can be used without fear of tax consequences. But it would be
7 complete speculation to consider what the law might possibly be far
8 in the future, whereas Debtors' decision about whether to enter the
9 Ford Program had to be made in the present. Birrane notes (at 500,
10 n.7) that, even though it is "not unlikely" that adverse tax
11 consequences may result from using the Ford Program, its
12 availability is nevertheless "a factor to be considered" in
13 determining whether a good faith effort was made to repay. This
14 Court has given due consideration to that factor, but cannot find a
15 lack of good faith in a decision to forgo the Ford Program where
16 Debtors' budget cannot meet the payments required and, under the
17 current state of the law, Debtors' calculations are that they will
18 be charged with taxable income of \$300,000 to \$400,000 on the eve
19 of their 80th birthdays.

20 21 CONCLUSION

22 For the reasons set forth above, Debtors have established that
23 repaying the New Loans in full would entail undue hardship. The
24 Court has considered whether Debtors could pay any part of the New
25 Loans without undue hardship, as provided by Saxman, and has
26 concluded that they cannot, for the reasons stated herein. The New
27 Loans are therefore dischargeable under §523(a)(8).

28

¹⁶ There is no evidence from which Debtors' solvency twenty-five years in the future can be determined.

1 Counsel for Debtors shall submit a form of judgment so
2 providing, after review by counsel for Creditor as to form.

3 Dated:

7
8 ARTHUR S. WEISSBRODT
9 UNITED STATES BANKRUPTCY JUDGE